

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: June 25, 2019
Hearing Time: 2:00 p.m.

In re

PERFORADORA ORO NEGRO.
S. DE R.L. DE C.V., al.,

Debtors.

Chapter 11

Case No. 18-11094 (SCC)

(Jointly Administered)

;

x

**OBJECTION OF THE UNITED STATES TRUSTEE TO THE DEBTORS' MOTION
FOR LEAVE TO FILE UNDER SEAL**

**TO: THE HONORABLE SHELLEY C. CHAPMAN,
UNITED STATES BANKRUPTCY JUDGE**

William K. Harrington, the United States Trustee for Region 2 (the “**United States Trustee**”) submits the following objection to the Debtors’ Motion for Leave to File under Seal (the “**Motion**”). ECF Doc. No. 204. Specifically, the Debtors seek to file part of the Motion of Foreign Representative for Order Pursuant to Bankruptcy Code Sections 105(A), 362, 363, 1520(A)(2), 1520(A)(3) and 1521(A)(7) Authorizing Entry into a Litigation Interest Agreement and Granting Related Relief, including the exhibits thereto (the “**Transaction Motion**”) under seal. See ECF Doc. No. 205. In support thereof, the United States Trustee respectfully states:

Introduction

Without providing any meaningful information, the Debtors seek an order from this Court allowing them to file under seal certain fees that they will be paying pursuant to a Litigation Interest Agreement.¹ According to the Debtors, the Litigation Interest Agreement gives the Debtors’ Assignee the authority to pay to preserve the Debtors’ ability to investigate

¹ Capitalized terms have the same definition as in the Motion.

and prosecute claims on behalf of the Debtors. See the Transaction Motion, pg. 6, ¶16. In return, the Debtors will make distributions to the Assignee for amounts recovered on account of the Debtors' claims, if any. See the Transaction motion, pg. 8, ¶20. The Debtors maintain – in a six page motion – with no accompanying declaration or any supporting evidence – that the “[m]otion and its supporting documents contain certain sensitive financial information and confidential commercial information regarding the Debtors and the Interest Assignee, the disclosure of which would harm the Debtors and the Interest Assignee.” See the Motion, pg. 5, ¶15. Further, the Debtors' assert that “[t]his sensitive, confidential information is entitled to protection under Bankruptcy Code section 107(b) and Bankruptcy Rule 9018.” Id. (emphasis added). The Debtors, however, have not met their burden for the Motion to be granted.

Specifically, the Debtors fail to explain why the amount of the fees paid by the Assignee to the Debtors and the amount that the Debtors anticipate distributing on account of recovered claims, if any (collectively referred to herein as the “**Fees**”) are sensitive financial information and confidential commercial information. Indeed, unilateral self-serving statements cannot shield important information from interested parties and more importantly, fail to meet the burden the Debtors face under section 107 of the Bankruptcy Code. The Debtors have not proffered any evidence—such as a declaration or otherwise – that would justify the extraordinary remedy of sealing. Moreover, it is imperative that parties know the total fees that the Debtors are paying and receiving in order to evaluate the reasonableness of the agreement. Accordingly, without more, the sealing of the Transaction Motion and its exhibits contravenes Bankruptcy Code Section 107 and, therefore, should not be countenanced.

Background

1. On June 7, 2019, the Debtors filed the Transaction Motion, which is heavily redacted, mainly with respect to the Fees. See, the Transaction Motion.
2. Specifically, the Transaction Motion provides that the Assignee will pay an initial purchase price to the Debtors, and the Assignee will obtain a return on the proceeds, if any, recovered on the Debtors' claims in accordance with a payment waterfall outlined in the Litigation Interest Agreement. Id. at ¶¶ 19-20².

3. On June 7, 2019, the Debtors filed the Motion seeking to seal and redact, in sum and substance, the Fees to be paid or distributed by the Assignee or the Debtors in the Transaction Motion.

Argument

Bankruptcy Code Section 107 sets forth the legal standard applicable to sealing information that is confidential. See also Fed. R. Bankr. P. 9018. Section 107(a) of the Bankruptcy Code provides, in part, that subject to certain limited exceptions:

a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

11 U.S.C. § 107(a). “There is a strong presumption and public policy in favor of public access to court records.” In re Borders Grp., Inc., 462 B.R. 42, 46 (Bankr. S.D.N.Y. 2011); see also, In re Food Mgmt. Grp., LLC, 359 B.R. 543, 553-55 (Bankr. S.D.N.Y. 2007) (Section 107 reflects Congress’ intent to favor public access to papers filed with the Bankruptcy Court).

Congress has “implemented a statutory exemption to prevent disclosure of commercial

² The facts not described herein are set forth in the Motion.

information in a bankruptcy case.” Borders, 462 B.R. at 46. Section 107(b) of the Bankruptcy Code provides in relevant part that:

[o]n request of a party in interest, the bankruptcy court shall, and on the bankruptcy court’s own motion, the bankruptcy court may –

- (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
- (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

11 U.S.C. § 107(b).³ “The exception to the general right of access in section 107(b) is narrow.”

Borders, 462 B.R. at 47. The burden is on the moving party to show that a request to place documents under seal falls within the parameters of Section 107(b). Id. at 46; Food Mgmt., 359 B.R. at 561.

Under Section 107(b), “commercial information” has been defined as information which would cause an “unfair advantage to competitors by providing them information as to the commercial operations” of the requesting party. Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994)(internal quotations omitted); accord Borders, 462 B.R. at 47. As this Court has stated:

the term [“commercial information”] includes situations where a bankruptcy court may reasonably determine that allowing such disclosure would have a chilling effect on business negotiations, ultimately affecting the viability of Debtors. Moreover, the Court must also find that the redacted information is so critical to the operations of the entity seeking the protective order that its disclosure will unfairly benefit the entity’s competitors.

Borders, 462 B.R. at 47-48 (internal quotations, citations and brackets omitted).

³ Bankruptcy Rule 9018 defines the procedure by which a party may move for relief under Section 107(b). Fed. R. Bankr. P. 9018.

Section 107(a) of the Bankruptcy Code provides that all papers “filed in a case under this title . . . are public records and open to examination” by the public. 11 U.S.C. § 107(a). “This policy of open inspection, codified generally in Section 107(a) of the Bankruptcy Code, evidences Congress’s strong desire to preserve the public’s right of access to judicial records in bankruptcy proceedings.” Orion, 21 F.3d at 26, accord In re Alterra Healthcare Corporation, 353 B.R. 66, 71 (Bankr. D. Del. 2006)(“[D]ocuments filed in bankruptcy cases have historically been open to the press and general public.”). Although the Debtors may have private contractual confidentiality agreements, they do not and cannot supersede the ethics and disclosure requirements of the Bankruptcy Code and Rules.

A limited exception to public disclosure may be invoked to protect “an entity with respect to a trade secret or confidential research, development or commercial information.” 11 U.S.C. § 107(b)(1); accord Fed. R. Bankr. P. 9018. Specifically, Bankruptcy Rule 9018 provides in pertinent part:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation.

Fed. R. Bankr. P. 9018.

The moving party bears the burden of showing that a request to place documents under seal falls within the parameters of Bankruptcy Code § 107(b) and Bankruptcy Rule 9018 by demonstrating “. . . that the interest in secrecy outweighs the presumption in favor of access.” In re Continental Airlines, 50 B.R. 334, 340 (D. Del. 1993); accord, In re Food Mgmt. Group, 359 B.R. 543, 561

(Bankr. S.D.N.Y. 2007); In re Fibermark, Inc., 330 B.R. 480 (Bankr. D. Vt. 2005). To meet this burden, the movant “must demonstrate extraordinary circumstances and compelling need to obtain protection.” Food Mgmt. Group, 359 B.R. at 561 (citing In re Orion Pictures Corp., 21 F.3d 24 at 27 (2d Cir. 1994)). A contractual agreement to keep information confidential is not determinative. See In re Muma Services Inc., 279 B.R. 478, 485 (Bankr. D. Del. 2002) (if parties could file documents under seal simply because of confidentiality provisions, then Court “would never have control over motion practice” and Section 107 “would be meaningless.”).

As noted above, the Motion contains little to no justification for the relief the Debtors seek other than noting that the Transaction Motion “and its supporting documents contain certain sensitive financial information and confidential commercial information regarding the Debtors and the Interest Assignee, the disclosure of which would harm the Debtors and the Interest Assignee.” See, the Motion, pg. 5, ¶15. These assertions, however, do not demonstrate that the Fees – which is the information sought to be sealed – are, in fact, commercially sensitive information for purposes of section 107(b). This vague and unsupported statement alone is simply not sufficient to overcome Congress’s strong desire to preserve the public’s right of access to judicial records in bankruptcy proceedings. See e.g., Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 561 B.R. 36, 43 (Bankr. S.D.N.Y. 2016) (“Evidence—not just argument—is required to support the extraordinary remedy of sealing.”). In sum, contrary to the Debtors’ assertions, it is not readily apparent that the sealing of the Transaction Motion and its exhibits is required or otherwise satisfies section 107(b) of the Bankruptcy Code, namely that such information actually constitutes confidential commercial information. Likewise, in furtherance of the approval of the

Transaction Motion, the disclosure of the Fees is necessary to demonstrate the reasonableness of the agreement. Therefore, the Motion must be denied.

WHEREFORE, the United States Trustee respectfully requests that the Court deny the Motion as requested herein and grant such other and further relief as the Court deems appropriate.

Dated: New York, New York
June 18, 2019

Respectfully Submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Shannon Anne Scott
Shannon Anne Scott
Trial Attorney
201 Varick Street, Suite 1006
New York, New York 10014
Tel. No. (212) 510-0500